SUPREME COURT, U. S.

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JOHN F. DAVIS, CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1966

No. 241

SARKES TARZIAN, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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NATIONAL LABOR RELATIONS BOARD,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Sarkes Tarzian, Inc., Petitioner, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered on April 7, 1967.

CITATION TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 64 LRRM 2463, ... F. 2d ....., and is printed in Appendix B hereto.[1] The find-

[1] The order of the Court denying a Petition for Rehearing and the Decree of the Court entered April 7, 1967, are also printed in Appendix B, infra, pp. 19, 20.

ings of fact, conclusions of law and order of the Board are reported at 61 LRRM 1513, 157 N.L.R.B. No. 96. The Trial Examiner's first decision (J.A. 8-72)[2], and the Trial Examiner's supplemental decision (J.A. 73-114) are not reported in the LRRM citation. The Board's Order Granting in Part and Denying in Part, Motion for Reconsideration (filed by Petitioner herein) is not reported (J.A. 194-198).[3]

JURISDICTION

The judgment of the Court of Appeals was entered on April 7, 1967, (Appendix B, infra.). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 10(e) of the National Labor Relations Act, as amended, hereinafter called the Act. (61 Stat. 136, 73 Stat. 519, 29 U.S.C. et seq.).

QUESTIONS PRESENTED

1. Does the nature of the Board's present case load, the type of violations coming before it, the fact that 66.1% of all charges filed against employers involve alleged violations of Section 8(a)(3) of the Act, and the fact that various U. S. Courts of Appeal apply disparate standards in reviewing findings of a violation of Section 8(a)(3), make it advisable, from the standpoint of the effective administration of the Act, that the U. S. Supreme Court issue a further pronouncement on this subject?

[2] "J.A." refers to the joint appendix filed in the Court of Appeals.

[3] The Court below, in Footnote 1 of its opinion, is incorrect. The modified order of June 22, 1966, was not reported on March 26, 1966 in 157 N.L.R.B. No. 96.

2. Is the opinion of the Court below in conflict with that of other United States Courts of Appeal as to the criteria to be applied in reviewing Board findings of violations of Section 8(a)(3) of the Act, particularly when a valid and legal reason for discharge is shown to exist? When the General Counsel of the Board has made out a weak prima facie case, and the Company then proves that a valid, legal reason for discharge undoubtedly existed, does the existence of such reason for discharge overcome the prima facie case, so as to make it incumbent on the General Counsel to present other and further evidence relating to the discharge, "as such"?

3. When one witness, on whose testimony the whole case of the Board depends, is contradicted by every other witness testifying about the same events, and, in addition, there is evidence in the record in the witness's own handwriting which shows that she was not telling the truth, is it incumbent on the U. S. Court of Appeals to evaluate this situation? Is this situation distinguishable from the situation where one witness is credited, and all others discredited?

4. Is it an unfair labor practice under Section 8(a)(1) of the Act to allow a rank and file employee to address a "captive audience" (legal under Board's standards) when such speech contains no threat of reprisal, or force, or promise of benefit?

5. Does the U. S. Court of Appeals properly discharge its duties under the Act when it only discusses the evidence from the Board's standpoint, and, indeed, makes factual findings not supported by the record?

6. Is it labor espionage for a company to receive unsolicited information about a labor organization, particularly when such information is freely and voluntarily imparted to it?

STATUTE INVOLVED

The statutory provisions involved are Section 8(a), subsections (1) and (3), as well as Sections 8(c), 10(c), and 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. et seq.) The aforementioned Sections are appended hereto as Appendix A.

STATEMENT

This case has a very involved history (Procedure summarized J.A. 2-5). In substance, the Trial Examiner issued his first decision in this case on September 26, 1963, *finding that Petitioner herein had not violated Section* 8 (a) (1) *and* (3) *of the Act.* In this first decision the discharge of one Melville Wilber was found to be for cause, in that Melville Wilber had violated a long standing plant rule against punching the time-card of another employee. The Trial Examiner found affirmatively, and as a fact, that even one of the General Counsel's own witnesses admitted that, at the time of his employment, *he was warned of the consequences of violating such rule (J.A. 54). He also found that "* * * there is no evidence in the record of any intentional violation of the company rule which has gone unpunished when discovered by a Supervisor.* * *"* (J.A. 55). The Trial Examiner also dismissed numerous allegations of violations of

Section 8(a) (1), deciding, in substance, that many speeches, given by Sarkes Tarzian, the President of Petitioner, to "captive audiences" of Petitioner's employees shortly before an N.L.R.B. election (held Jan. 25, 1963) were within the protective ambit of Section 8(c) of the Act. In other words, he decided that Petitioner herein had merely exercised its right of "free speech".

After the issuance of the Trial Examiner's first decision, the Board granted a motion to reopen the record, and a second hearing was held for the purpose of receiving newly discovered evidence. This "newly discovered evidence" consisted, almost entirely, of the testimony of one Hattie Logie, a former employee in Petitioner's Quality Control. Involved in the second hearing was an allegation, based on a new charge, that the Petitioner had refused to re-hire Hattie Logie unless she would agree to engage in certain anti-union activities. Hattie Logie testified at the second hearing, but even her testimony indicated that her so-called espionage activities did not commence for "two or three days; it could have been a week" (J.A. 397) after the N.L.R.B. election, which was held on January 25, 1963. (The Court below erroneously found that her espionage activities commenced *before* the election.) *Melville Wilber was discharged on October 16, 1962, and no new evidence was introduced at the reopened hearing which in any way related to or antedated his discharge.*

Hattie Logie's supposed espionage activities commenced, according to her own testimony, shortly after January 25th,

1963.[4] Her testimony was contradicted by that of W. D. Woods, General Counsel of the Company (J.A. 374-380), and a member of the Bar of the U. S. Supreme Court for 25 years. It was also contradicted by Delphia M. Haynes, Petitioner's Personnel Counselor (J.A. 483-498); Sarkes Tarzian, Petitioner's President (J.A. 509-513); Robert J. Porter, a Quality Control Engineer and Hattie Logie's Foreman (J.A. 477-483). Every single witness who testified contradicted Hattie Logie. In addition, Logie's own testimony (J.A. 312-434) is inconsistent with General Counsel's Exhibit No. 9, a document dated May 14, 1964, in her own handwriting (J.A. 557), as well as General Counsel's Exhibit No. 13, a letter from W. D. Woods to Hattie Logie written contemporaneously with the events about which the testimony was given (J.A. 563-565). It is also inconsistent with another letter written by W. D. Woods, under date of May 20, 1964, in evidence as General Counsel's Exhibit No. 14 (J.A. 566). The last exhibit is a letter to Hattie Logie written contemporaneously with the events about which testimony was taken. The foregoing three documents are perfectly consistent with the testimony of W. D. Woods, but there is absolutely no theory on which they can be reconciled with the testimony of Hattie Logie. It is absolutely impossible that Hattie Logie could have been telling the truth.

Hattie Logie did testify as to one incident occurring in late October or early November, 1962, when she was required

[4] The Court below, with no support in the record, found that these activities commenced "before" the election. Hattie Logie's own testimony is to the contrary.

by Foreman Porter to attend a "captive audience" meeting under threat of discharge. Foreman Porter denied this, but even if this happened, it raises the very interesting question of whether or not compelling an employee to attend an otherwise perfectly legal "captive audience" is an unfair labor practice. The Board said it was. The Court below did not even pass on this question, leaving the Board decision as outstanding case law.

Although no new evidence was introduced which was in any way related to the case of Melville Wilber, because even Hattie Logie's testimony related only to events occurring after Melville Wilber's discharge, the Trial Examiner, who reversed himself in his supplemental decision, said, with no new evidence before him which in any way related to Melville Wilber, that Melville Wilber was discharged in violation of Section 8(a) (3). In regard to certain 8(a) (1) allegations which he had dismissed as "isolated" and "jocular" in his first decision, he reversed himself and found a violation.

In its decision and order the Board found certain 8(a) (1) violations, and found violations of Section 8(a) (3) in the cases of Melville Wilber and Hattie Logie. It ordered reinstatement of both employees. Upon a motion for reconsideration being filed by Petitioner herein, pointing out that the complaint alleged a refusal to rehire, the Board modified its decision and order to require that Hattie Logie be re-employed, with back pay to run from the first date when a job she was qualified to fill had become and/or became available at the Company.

The Board's decision and order, as modified, was affirmed by the Court below. Petitioner represents that such action on the part of the Court resulted from its failure to consider the record 'in its entirety, including the body of evidence opposed to the Board's view.' In regard to the case of Melville Wilber, the opinion of the Court below, at least by necessary implication, is in conflict with a decison by the United States Court of Appeals for the Fifth Circuit, decided February 8, 1967, in the case of *National Labor Relations Board v. I. V. Sutphin Co.—Atlanta, Inc.*, reported in 64 LRRM at 2329. It also conflicts with *N.L.R.B. v. Brennan's, Inc.*, CA-5, 1966, 366 F. 2d 560, 63 LRRM 2019, 2499; *N.L.R.B. v. Soft Water Laundry, Inc.*, CA-5, 1965, 346 F. 2d 930, 59 NLRRM 2484; *Schwob Mfg. Co. v. N.L.R.B.*, CA-5, 1962, 297 F. 2d 864, 49 LRRM 2360; *N.L.R.B. v. McGahey*, CA-5, 1956, 233 F. 2d 406, 38 LRRM 2142. Also, see the second opinion of the Fifth Circuit in *N.L.R.B. v. Walton Mfg. Co.*, 124 NLRB No. 181 (1959) 45 LRRM 1007 CA 5 (1961) 286 F. 2d 16, enf'g in part 45 LRRM 1007; 47 LRRM 2367, reversed U. S. Sup. Ct. (1962) 369 U.S. 404, 82 S. Ct. 853; 49 LRRM 2962 on remand CA 5 (1963) 322 F. 2d 187; 54 LRRM 2118.

The decision of the Court below in the case of Hattie Logie, and related 8(a) (1) violations, is directly contrary to the teachings of the United States Supreme Court in *Universal Camera Corp. v.* N.L.R.B., 79 NLRB 379 (1948), 22 LRRM 1382; enf'd (NLRB v.) CA 2 (1950), 179 F. 2d 749, 25 LRRM 2256; vac'd (v. NLRB) U. S. Sup. Ct. (1951), 340 U.S. 474-497, 71 S. Ct. 456, 27 LRRM 2373. If the U. S.

Courts of Appeal are, for all practical purposes, going to give absolute finality to the Board's findings, even though such findings are directly contrary to undisputed and uncontradicted documentary evidence introduced by the General Counsel, and even though such findings are directly contrary to all other testimony in the record, then we have returned to the days of the Wagner Act, and the standard of review prescribed by Section 10(e) of the Act has become meaningless.

It was shown at the re-opened hearing that one Leola Hostetter, a rank-and-file employee of Petitioner, gave one or two speeches (shortly before the election on January 25, 1963) to employees at legal "captive audience" meetings. Other employees were not denied an opportunity to reply. Hostetter was already known to be a vigorous opponent of the Union at the time the speeches were made. The Court below, sub-silentio, affirmed the Board's findings that it is unfair labor practice for such speeches to be made.

All of the foregoing will be set forth and substantiated in detail if this Petition for a Writ of Certiorari is granted.

REASONS FOR GRANTING THE WRIT

1. Table 2—Types of Unfair Labor Practices Alleged, Fiscal Year 1966—31st Annual Report of the National Labor Relations Board, not yet issued, but now at the Government Printing Office (reprinted here as Appendix C) shows that, in fiscal 1966, 66.1% of all charges filed against employers under Section 8(a) of the Act dealt with alleged violations of Section 8(a)(3). Although Section 8(a)(3), (Sec-

tion 8(3) under the Wagner Act), has been in existence since 1935, it still accounts for the bulk of the Board's business. Litigation arising under Section 8(a)(3) frequently takes place because of disparate standards of review applied by various United States Courts of Appeal. As a practical matter, labor lawyers, most of whom now practice across the geographical boundary lines of the various Courts of Appeal, have to give advice about the law which varies because of geographical considerations.[5] Similarly, the Board, in any realistic sense, is faced with a very real problem in the administration of the Act. Petitioner doubts that the Board would seriously contend that the various U. S. Courts of Appeal do not, in language and/or actual practice, apply different standards of review to findings of violations of Section 8(a)(3). It is somewhat difficult to bring the actual conflict into sharp relief. Nevertheless, there is sufficient similarity between some of the cases decided by different circuit courts to make it certain that there is a conflict, both as to language expressing the law, and as to its application. Since the efficient administration of the Act, as is true with our other laws, is largely dependent on the type and quality of advice given by private practitioners to their clients, and, since, at even this late date, despite the teachings of the U. S. Supreme Court, there exists confusion as to the proper standards of review to be applied to discharge cases, it would assist the Board, the Bench, and the Bar, if the U. S. Supreme Court would make some further pronouncement of the law applicable to review of alleged viola-

[5] One of the most frequent questions ever asked labor counsel for companies is whether or not a certain man may be fired without violating the law.

tions of Section 8(a) (3). More particularly, when a valid and legal ground for discharge exists, must an attorney advise a client that he better not fire the man because the man is known to be a union adherent, under pain of having the Board find that the reason for discharge was a mere pretext, the only reason for such pretext finding being that the man was an active union adherent? If the employee happens to have violated Section 8(a) (1) in some few respects, does it necessarily follow that any and all discharges of union adherents occurring after such activity are illegal, without regard to the existence of a valid and legal reason for the discharge? Under the law, as it is now administered by the Board, and by certain United States Courts of Appeal, a union man, known by the company to be such, is virtually immune from discharge.

2. The case of Melville Wilber brings the Court below into conflict with the Fifth Circuit. In *N.L.R.B. v. I. V. Sutphin Co.—Atlanta, Inc.*, decided February 8, 1967, 64 LRRM 2329, in speaking of the law relating to discharge cases, the United States Court of Appeals for the Fifth Circuit said:

> "The law applicable to the issue here is clear and may be succinctly stated. The burden is upon the General Counsel to prove and not on the employer to disprove that the purpose of the discharge was to interfere with rights accruing to Adams under Sections 8(a) (3) and (1) of the Act. The Act does not insulate an employee from discharge for engaging in conduct disruptive of harmonious employee relations. Indeed, an employer may discharge for cause or no cause at all. It is only when anti-unionism is the dominant motive for the discharge that the Act is violated. * * * The

burden of proof is carried only when substantial evidence pointing toward the unlawful motive appears * * *.

"The finding of the Section 8(a)(1) violations here will not carry the day for the conclusion that the discharge was inspired and motivated by anti-unionism. To be sure a Section 8(a)(3) violation makes out a Section 8(a)(1) violation, but the converse does not follow. Whether the Section 8(a)(3) charge stands or falls will depend upon the weight of the evidence touching on the charge. In this connection the Section 8(a)(1) violations and the knowledge which management had of Adams' feeling on the union question were significant factors to be considered by the Examiner and by the Board in determining motive for the discharge. Nevertheless, we have often sustained Section 8(a)(1) charges while rejecting findings of Section 8(a)(3) violations stemming from employee discharges. * * *

"It is clear from the evidence that Adams threatened Warthen with physical violence. This was cause for the discharge. The only evidence to sustain a finding of improper motive in the discharge consists of the opposition of the company to unionization, the interrogations, including the interrogation of Adams, which resulted in the Section 8(a)(1) violations, and the general background material which showed that Adams was a talker and jokester on other occasions. This is insufficient to sustain the burden of showing an improper motive under the circumstances. This substantiality necessary for us to sustain the finding of the Board is lacking.

"The sum of the situation is that General Counsel made out a prima facie case on the improper motive charge by showing the section 8(a)(1) violations with which Adams was inseparably related and from which an inference of improper motive could have been drawn. *The employer then established good cause for discharging Adams. This overcame the inference and cast the*

> *burden back on the General Counsel to overcome Respondent's case.* No additional proof was offered; *not even Adams contradicted the fact of the threat.* * * *"
> (Emphasis supplied)

In the case of Melville Wilber, the General Counsel presented evidence from which it is possible that one reading the record could infer a knowledge of Wilber's union activities by the Company. The evidence in this connection was very weak, as the Trial Examiner found in his first decision. The Company then introduced evidence of a valid legal reason for discharge. *Even Melville Wilber admitted that the reason existed.* This cast the burden back on the General Counsel to prove the real motive behind the discharge. While some employees did testify that they punched other employees' time-cards, they did not testify that the Company knew of it. The testimony was to the contrary. It was not incumbent on Petitioner to prove that it had discharged employees in the past for violation of the rule against punching another employee's time-card. It was incumbent on the General Counsel, once a proper motive has been established, to introduce competent evidence showing an improper motive. This the General Counsel did not do.

The opinion of the Court below makes it appear that the Company was under some duty to show that it had discharged more than one employee in the past for the violation of the rule against punching another employee's time card. This is placing the burden of proof on the wrong party. Furthermore, an inference of disparate treatment is only possible when Company knowledge of other violations is shown.

The Court below also adverted to Company hostility to the Union. However, most of this hostility was evidenced by speeches protected by Section 8(c) of the Act, and the Act plainly states that such utterances may not be used as evidence of unfair labor practices.

3. The Board holds "captive audiences" of employees to be legal, under certain circumstances, for purposes of its representation case law. Private practitioners are very frequently questioned by an employer as to whether or not he may compel employees to attend such a meeting. Prior to the decision of the Board and the Seventh Circuit, it appeared that the doctrine of "captive audiences" carried with it, by necessary implication, the legal power of the employer to compel attendance. The Board found such compulsion of attendance to be unfair labor practice, and the Court below, sub silentio, left this finding intact. Since the Board handles thousands of representation cases every year, and since one of the first legal questions an employer wishes to have answered by labor counsel relates to what the employer may say, when the employer may say it, etc., it would be wise to have this question authoritatively determined. It would also prevent a private practitioner from being placed in a position where he would have to explain to a client that, while it was perfectly legal to have a captive audience, and perfectly legal to give a speech within the ambit of Section 8(c), if any employee refused to go to the "captive audience" meeting, that he, the Employer, was powerless

to do anything about it. It is hard enough to explain the vagaries of the Board to a private citizen, anyway, without compounding the confusion.

4. A proper review of this case by the U. S. Supreme Court would show the various circuits how a record should be reviewed 'in its entirety'.

5. The Trial Examiner, in his first decision, found that Section 8(c) applied. In his supplemental decision he did not apply it. The Board did not apply it. The Court below, sub silentio, affirmed such nonapplication. This brings the Court below into conflict with the Courts of Appeal for the Fifth Circuit, the Tenth Circuit, the Fourth Circuit, the Sixth Circuit and the Eighth Circuit. See *N.L.R.B. v. Colvert Dairy Products Co.*, (CA-10) decided May 7, 1963, rehearing denied June 12, 1963, 317 F. 2d 44, at 46, where the Court said: "In the matter of the election the Management is, of course, anti-union. The Union is equally anti-company. It is necessarily so, and hostility to each other in such regard is not an unfair labor practice." See, also, the decision of the Court of Appeals for the Sixth Circuit, decided February 27, 1965, in the case of *Surprenant Mfg. Co. v. N.L.R.B.*, 341 F. 2d 756 at 758 and 79. Also, see *Union Carbide Corp. v. N.L.R.B.*, 310 F. 2d 844, (CA-6); *N.L.R.B. v. Transport Clearings, Inc.*, 311 F. 2d 519, 523-524, (CA-5); *N.L.R.B. v. Threads, Inc.*, 308 F. 2d 1, 4, 8, 9, (CA-4); *N.L.R.B. v. Herman Wilson Lumber Co.*, (1966) 355 F. 2d 426 at 429, 430, (CA-8).

6. The Court below did not even require the Board to apply its own case law holding that when the ratio of employees

interrogated is negligible when compared with the number of employees involved in an election, no remedial order is justified. See *General Electric Co.*, 143 N.L.R.B. 926, decided July 30, 1963.

7. There should be an authoritative pronouncement from the U. S. Supreme Court as to whether or not an employer violates the law when he receives unsolicited information from an employee about union activities, particularly when such information is freely and voluntarily imparted by such employee.

8. The decisions of the Board and the Court below are erroneous, particularly in regard to the 8(a)(3) aspects of this case.

The foregoing should be sufficient to justify the granting of the Writ. The Board should agree with some of the reasons. This case would be a very appropriate vehicle for some much needed pronouncements from the U. S. Supreme Court.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

/s/ JOSEPH ALTON JENKINS

JOSEPH ALTON JENKINS,
Counsel for Petitioner.

APPENDIX A

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. et seq.) are as follows:

SECTION 8(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(2) * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

SECTION 8(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

SECTION 10(c) * * * No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. * * *

SECTION 10(e) * * * The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

APPENDIX B

In the

United States Court of Appeals
For the Seventh Circuit

No. 15757 SEPTEMBER TERM, 1966—JANUARY SESSION, 1967

SARKES TARZIAN, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition to Review and Cross Petition to Enforce an Order of the National Labor Relations Board.

FEBRUARY 27, 1967

Before CASTLE, SWYGERT, and CUMMINGS, *Circuit Judges.*

SWYGERT, *Cricuit Judge.* Sarkes Tarzian, Inc. petitions for review of an order of the National Labor Relations Board; the Board cross-petitions for enforcement of its order.[1] The order resulted from the Board's findings that the company violated sections 8(a) (1) and (3) of the National Labor Relations Act, 29 U.S.C. §§158(a) (1) and (3), by certain conduct occurring both prior and subsequent to an employee representation election held at the company's plants in the Bloomington, Indiana area in January 1963.

The company manufactures electronic equipment, employing in excess of two thousand production and maintenance workers. During 1962 the union[2] attempted to organize these

[1] The Board's decision and order (as modified June 22, 1966) are reported at 157 N.L.R.B. No. 96 (March 26, 1966).

[2] International Brotherhood of Electrical Workers, AFL-CIO.

employees. The union filed a representation petition in October 1962, and an election was held which the union lost. The union continued its organizational activities after the election. It also filed timely objections to the election results and charges of unfair labor practices against the company with the Board. The objections and charges were consolidated for hearing, but only the unfair labor practices found by the Board are before us in this review.[3]

The Board found that the company violated section 8(a)(1) by questioning employees about their membership in the union, by threatening employees with discharge and other reprisal for union activity, and by soliciting and encouraging employees to engage in surveillance of union activities and to participate in antiunion conduct. The Board also found that the company violated section 8(a)(3) as well as section 8(a)(1) by discharging employee Melville Wilber for his union membership and by refusing to rehire former employee Hattie Logie unless she accepted a job screening employment applicants concerning their union activities. The Board's order requires the company to desist from the unfair labor practices found and, affirmatively, to offer Wilber and Logie employment in their former (or substantially similar) jobs and to compensate them for wages lost because of the company's discriminatory conduct.

The company's principal attack upon the substantiality of the evidence to support the Board's findings is directed against the credibility resolutions of the Board's trial examiner. After considering the record as a whole we have concluded that it presents no exceptional circumstances which would make inapplicable the rule that the Board's action in crediting and discrediting witnesses will not ordinarily be disturbed on review. Our discussion of the evidence will be limited accordingly.

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[3] The Board's action in setting aside the election and directing that a new election be held is not a final reviewable order.

Violations of section 8(a)(1)

The Board's findings that the company committed several violations of section 8(a)(1) are fully supported by the record. A brief resume of the company's course of conduct with respect to employees Leola Hostetter and Hattie Logie is sufficient to illustrate that the company engaged in proscribed activities in venting its hostility to union representation of its employees.

Leola Hostetter was active in an employee group opposing the union. She was asked by the plant manager to check a list of "group leaders" in the plant and to indicate those who were prounion and antiunion. Later, the company president's wife, who assumed an active role in management, told the plant manager that employees who were "disloyal" because of their union sympathies were not to be promoted to the position of group leader. Shortly before the election the company's general counsel asked Hostetter to listen to the conversation of the women employees in the restroom and to report back their feelings about the forthcoming election. Hostetter made many such reports to the general counsel and to Mrs. Tarzian, the president's wife. Mrs. Tarzian also requested Hostetter to give antiunion speeches at employee meetings arranged and conducted by the company's management. Hostetter made at least two such speeches. Finally, Hostetter was authorized to use materials from the company's supplies to make antiunion signs and badges. Just before the election the company's general counsel asked Hostetter to have some tags printed which read "Vote No" and to pass them out to the employees. Hostetter complied with the request and was later reimbursed by the general counsel for the printing charge.

Employee Hattie Logie was also enlisted in the company's campaign to defeat the union. Initially, Logie was a member of the union's organizing committee. After twice threatening Logie with discharge for abstenteeism, her foreman suggested that the "company could do more for [her] than what the union was doing, and then the company would have no reason to fire [her]." Following this incident, Logie told an

interviewer in the company's personnel office that she wanted to switch "from being for the union to being for the company." When this statement was repeated to the company president, Tarzian, he told Logie that he "would guard [her] night and day, if necessary, and he would spare no expense to guard [her] against the damn Communists." Thereafter, it was agreed that if Logie remained openly for the union but spied on its activities, the company would secure a job for her in Yakima, Washington, where she wanted to go. In addition, the company began making periodic payments to Logie, ranging from five to sixty dollars, which continued throughout the period of her collaboration with the company.

Logie's espionage activities, which began before the electoin, continued for approximately one year after the election. Under instructions from the company, she attended union meetings and reported back as to the union's activities. She signed an authorization card, obtained signatures on cards from employees she was rather certain supported the union, and displayed the cards to company officials before returning them to union headquarters. She met surreptitiously with company representatives in the general counsel's home and reported on her surveillance activities. Later, the company paid for the installation of a private unlisted telephone in Logie's home so that she could report her experiences more readily. Eventually, Logie was able to persuade company officials that her spying activities were becoming too risky, and in February 1964 the company contributed substantially toward the expenses incurred in moving her from Bloomington, Indiana to California.

We think the evidence relating to employees Hostetter and Logie itself amply justifies the Board's findings and order as to the company's violations of section 8(a)(1) of the act. For this reason, other company conduct cited by the Board in support of its position does not require discussion.

Violations of sections 8(a)(1) and (3); discharge of Melville Wilber

Melville Wilber was a member of the union organizing committee and actively solicited union membership. Com-

pany supervisory personnel were aware of this. Shortly after he was warned by his foreman not to speak in support of the union because he was being "watched," and shortly after the union filed its representation petition, Wilber was discharged. The stated reason for the discharge was that Wilber violated a company rule against punching another employee's timecard. On October 16, 1962, Wilber punched his mother's timecard after his mother returned home to retrieve forgotten dentures. Wilber's mother returned to the plant a few minutes after the 7 a.m. starting time, but no loss of production occurred. Wilber was discharged later the same day.

Wilber had a nine-year employment record free of complaints about his work or conduct. Several other employees had punched timecards of fellow employees during the period prior to Wilber's discharge without being disciplined therefor, despite an admitted company rule against such conduct.[4] Under the circumstances of Wilber's summary discharge, and against the background of the company's intense hostility toward the union, the Board was justified in inferring that Wilber's discharge was motivated by his union activity and that his violation of the company rule was a pretext for discriminatory action.

Violation of sections 8(a)(1) and (3); refusal to rehire Hattie Logie

In June 1964, four months after the company assisted her in moving to California,[5] employee Hattie Logie returned to Bloomington. She immediately telephoned the company's general counsel and requested employment in the quality control department where she had worked previously. Without indicating the availability of such a position, the general

[4] At the hearing, the company referred to three instances where employees werre discharged for violation of this rule, but evidence was introduced only as to one employee. This employee, discharged for punching another employee's timecard in 1953, had received a prior warning for a violation of Company rules. The same employee was rehired by the company in 1955.

[5] The company offered Logie employment in its California plant during her stay there, but the offer was not accepted.

counsel offered Logie a job in the personnel office screening applicants for employment concerning their union sympathies, a job Logie had once refused during her tenure as a company spy. When she refused the offer, Logie was told that she had better "go to work over at RCA." A few days later Logie submitted a formal application for a position in the quality control department, but the company never tendered further employment.

On these facts the Board could find that the company violated the prohibition of section 8(a) (3) against discouraging union membership "by discrimination in regard to hire * * * or any term or condition of employment." The violation consisted of attaching the discriminatory condition of union surveillance to the tender of employment. Logie was thereby denied her statutory right "to be considered for employment on a nondiscriminatory basis." *NLRB v. Lummus Co.*, 210 F. 2d 377, 381 (5th Cir. 1954). The Company notes that Logie had terminated her employment with the company and had no legal right to be rehired. It argues that for this reason no violation of section 8(a) (3) occurred, since the Board did not find that a job of the kind sought by Logie was available at the time of her application. We agree with the Board, however, that the violation occurred when Logie's application was acted upon in a discriminatory fashion. The availability of a job for which Logie was qualified and had applied was necessary for the Board's consideration only in relation to the remedy which would best effectuate the policy underlying the act. In this regard, the Board's modified order provides that Logie shall be offered employment "in the same or substantially equivalent position at which she would have been employed absent the discrimination against her if such position became available subsequent to her * * * application for reemployment, or as soon hereafter as it becomes available." Such a remedy is within the Board's discretion. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941).

The Board's order will be enforced.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit.

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Thursday, April 6, 1967

Before

Hon. LATHAM CASTLE, Circuit Judge
Hon. LUTHER M. SWYGERT, Circuit Judge
Hon. WALTER J. CUMMINGS, JR., Circuit Judge

No. 15757

SARKES TARZIAN, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Petition for review of an order of the National Labor Relations Board.

IT IS ORDERED by the Court that the petition for a rehearing of this cause be, and the same is hereby, DENIED.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

No. 15,757

SARKES TARZIAN, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

DECREE

Before: Castle, Swygert, and Cummings, Circuit Judges.

THIS CAUSE came on to be heard upon the petition of Sarkes Tarzian, Inc., to review and set aside an order of the National Labor Relations Board issued against petitioner on March 29, 1966, and upon the Board's cross-petition for enforcement of said order. The Court heard argument of respective counsel on January 6, 1967, and has considered the briefs and the transcript of record filed in this cause. On February 27, 1967, the Court, being fully advised in the premises handed down its decision granting enforcement of the Board's order. In conformity therewith, it is hereby

ORDERED, ADJUDGED AND DECREED by the Court that the order of the National Labor Relations Board, dated March 29, 1966, directed against Petitioner, its officers, agents, successors, and assigns, be enforced, and that Sarkes Tarzian,

Inc., its officers, agents, successors, and assigns abide by and perform the direction of the Board in said order contained.

U.S.C.A.—7th Circuit
FILED
APR 7—1967
KENNETH J. CARRICK
Clerk

/s/ LATHAM CASTLE

Judge, United States Court of Appeals for the Seventh Circuit

/s/ LUTHER M. SWYGERT

Judge, United States Court of Appeals for the Seventh Circuit

/s/ WALTER J. CUMMINGS, JR.

Judge, United States Court of Appeals for the Seventh Circuit

A True Copy:
Teste:

KENNETH J. CARRICK

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX C

Table 2.—Types of Unfair Labor Practices Alleged, Fiscal Year 1966

	Number of cases showing specific allegations	Percent of total cases
A. CHARGES FILED AGAINST EMPLOYERS UNDER SEC. 8(a)		
Subsections of Sec. 8(a): Total cases	10,902	100.0
8(a)(1)	869	8.0
8(a)(1)(2)	350	3.2
8(a)(1)(3)	5,427	49.8
8(a)(1)(4)	30	0.3
8(a)(1)(5)	2,347	21.5
8(a)(1)(2)(3)	182	1.7
8(a)(1)(2)(4)	2	0.0
8(a)(1)(2)(5)	92	0.8
8(a)(1)(3)(4)	217	2.0
8(a)(1)(3)(5)	1,233	11.3
8(a)(1)(4)(5)	8	0.1
8(a)(1)(2)(3)(4)	14	0.1
8(a)(1)(2)(3)(5)	97	0.9
8(a)(1)(2)(4)(5)	1	0.0
8(a)(1)(3)(4)(5)	23	0.2
8(a)(1)(2)(3)(4)(5)	10	0.1
RECAPITULATION[1]		
8(a)(1)[2]	10,902	100.0
8(a)(2)	748	6.9
8(a)(3)	7,203	66.1
8(a)(4)	305	2.8
8(a)(5)	3,811	35.0
B. CHARGES FILED AGAINST UNIONS UNDER SEC. 8(b)		
Subsections of Sec. 8(b): Total cases	4,941	100.0
8(b)(1)	938	19.0
8(b)(2)	182	3.7
8(b)(3)	265	5.4
8(b)(4)	1,692	34.3
8(b)(5)	7	0.1
8(b)(6)	12	0.3
8(b)(7)	380	7.7
8(b)(1)(2)	1,285	26.0
8(b)(1)(3)	108	2.2
8(b)(1)(5)	2	0.0
8(b)(1)(6)	2	0.0
8(b)(2)(3)	7	0.1
8(b)(2)(5)	1	0.0
8(b)(3)(6)	7	0.1
8(b)(1)(2)(3)	39	0.8
8(b)(1)(2)(5)	8	0.2
8(b)(1)(2)(6)	3	0.1
8(b)(1)(3)(5)	1	0.0
8(b)(1)(3)(6)	2	0.0

	Number of cases showing specific allegations	Percent of total cases
RECAPITULATION[1]		
8(b)(1)	2,388	48.3
8(b)(2)	1,525	30.9
8(b)(3)	429	8.7
8(b)(4)	1,692	34.2
8(b)(5)	19	0.4
8(b)(6)	26	0.5
8(b)(7)	380	7.7
B1. ANALYSIS OF 8(b)(4)		
Total cases 8(b)(4)	1,692	100.0
8(b)(4)(A)	70	4.1
8(b)(4)(B)	1,003	60.3
8(b)(4)(C)	25	1.5
8(b)(4)(D)	486	28.7
8(b)(4)(A)(B)	93	5.5
8(b)(4)(B)(C)	12	0.7
8(b)(4)(A)(B)(C)	3	0.2
RECAPITULATION[1]		
8(b)(4)(A)	166	9.8
8(b)(4)(B)	1,111	65.7
8(b)(4)(C)	40	2.4
8(b)(4)(D)	486	28.7
B2. ANALYSIS OF 8(b)(7)		
Total cases 8(b)(7)	380	100.0
8(b)(7)(A)	126	33.2
8(b)(7)(B)	11	2.9
8(b)(7)(C)	231	60.8
8(b)(7)(A)(B)	6	1.6
8(b)(7)(A)(C)	4	1.1
8(b)(7)(B)(C)	1	0.2
8(b)(7)(A)(B)(C)	1	0.2
RECAPITULATION[1]		
8(b)(7)(A)	137	36.1
8(b)(7)(B)	19	5.0
8(b)(7)(C)	237	62.4
C. CHARGES FILED UNDER SEC. 8(e)		
Total cases 8(e)	90	100.0
Against unions alone	73	81.1
Against employers alone	0	0.0
Against union and employers	17	18.9

[1] A single case may include allegations of violation of more than one subsection of the Act. Therefore, the total of the various allegations is greater than the total number of cases.

[2] Subsec. 8(a)(1) is a general provision forbidding any type of employer interference with the rights of the employees guaranteed by the Act, and therefore is included in all charges of employer unfair labor practices.